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Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-6722

CURTIS KAMINER, BRIAN KAMINER, and MONA KAMINER, minors, by and through their natural father, legal guardian and next friend, GERALD KAMINER,

Petitioners,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PETITION NOT PRINTED

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Petitioners seek review by certiorari of a decision[1] of the Court of Appeals for the Fifth Circuit claiming that in a diversity action the court did not follow the Erie

[1]Kaminer v. Franklin Life Ins. Co., 472 F.2d 1073 (5th Cir. 1973)

doctrine and decided the issues of the case contrary to the law of the state as declared by its highest court.

Respondent's answer is that the Court of Appeals did in fact apply and follow the law of Florida as declared by its highest court and the petition presents no other issue warranting this Honorable Court's exercise of its discretionary certiorari jurisdiction.

The case involves basically the issue of the validity and enforceability of a policy of life insurance on the life of a person already deceased at the time of issuance and delivery of the policy and payment of the first premium (after the death of the person allegedly insured delivery of the policy was made to and payment of the first premium made by the owner of the policy who was someone other than the alleged insured).

Contrary to the contentions of petitioners the opinion of the Court of Appeals on its face shows that the case was decided with strict observance of the command of *Erie*.[2]

The scrupulous adherence of the Court of Appeals to state law as declared by the Florida Supreme Court is obvious:

> ". . . On this issue the Erie doctrine requires us to follow the law as declared by the Supreme Court of Florida in Gulf Life Ins. Co. v. Ellis, 1940, 145 Fla. 262, 198 So. 836, 837:
>
> 'The terms of the contract were plain and un-

[2]Erie R. Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)

> ambiguous and since the insured was not alive and in good health on the effective date of the policy as its terms require, we have reached the conclusion that it never took effect and recovery cannot be had thereunder. It is certainly not an unreasonable requirement that the insured be alive and in good health on the date of the delivery of the policy.' "

472 F.2d at 1076.

Petitioners assert a conflict between the decision of the Court of Appeals below and a decision of an intermediate or lower Florida appellate court in the case of *Enfinger v. Order of United Commercial Travelers*, D.C. App.Fla. 1st Dist., 1963, 156 So.2d 38. Had *Enfinger* been a decision of Florida's highest court, it would posit no conflict with the decision of the Court of Appeals in the present case. Petitioners continue to misplace their confidence, as they did in the court below, in an inapposite authority. The Court of Appeals pointed out that *Enfinger* involved the reinstatement of a previously issued policy while the case at bar involves an original application for a policy of insurance. The important distinction between the operative fact situations in the two cases and petitioners' mistaken reliance upon the *Enfinger* decision of a lower Florida court was explicitly referred to by the court below at page 1077 of the opinion:

> "The Plaintiffs mistakenly rely upon Enfinger v. Order of United Commercial Travelers, D.C. App.Fla., 1st Dist., 1963, 156 So.2d 38, as holding to the contrary. There, the insured was 'automatically suspended from the benefits of his

lodge' (156 So.2d at 39). The court spoke of waiver of a 'forfeiture' or being estopped from relying on a 'forfeiture' (156 So.2d at 42). Indeed the court made the distinction explicit:

> 'It must be borne in mind that this was not an original application for membership in the Order or for an initial certificate of insurance, but was an application for reinstatement to a status previously occupied and to an indemnity formerly existent. The insurance certificate actually dated and issued on February 8, 1961, bore the identical number (548851) which appears on Mr. Enfinger's original certificate. We cannot consider appellee's defense anything more nor less than reliance upon a forfeiture.'

156 So.2d at 42-43."

Indisputably, the Court of Appeals, contrary to petitioners' assertion, did apply the controlling law of the state as declared by its highest court, the Supreme Court of Florida, in *Gulf Life Insurance Company v. Ellis, supra,* to arrive at the correct result of the appeal.

No conflict with any decision of this Court or of any other circuit is asserted, there is no constitutional or Federal question involved and there is no compelling reason why this Court should exercise its jurisdiction to review the case.

The Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, a copy of the foregoing Brief for Respondent in Opposition was served by mail this 4 day of June, 1973 on:

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